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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 707

PAUL F. BEITER,

Petitioner,

vs.

CHARLES ERB and
LOUIS FRANKEL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Paul F. Beiter, The Petitioner, prays that a Writ of Certiorari issue to review the judugment of the United States Court of Appeals for the Seventh Circuit entered in the above designated cause.

The Record in the Court of Appeals, filed by Petitioner, consists of (1) the Record ordered up from the District Court upon the filing of this Cause in the Court of Appeals; (2) the opinion of the Court of Appeals; (3) the Petition for a rehearing on the part of Paul F. Beiter; (4) the Denial of the Petition for rehearing.

(A) STATEMENT OF FACTS.

The Petitioner, Paul F. Beiter, a Citizen of Wisconsin, brought an action against Charles Erb and Louis Frankel, Citizens of Illinois, in the United States District Court for The Northern District of Illinois, Eastern Division. It had as its object the recovery of damages in the amount of Ten Thousand ($10,000.00) Dollars for injuries to the person and property. The Complaint (see record sent up by U. S. District Court page 9) was brought under Chapter 8, Section I of The Illinois Statutes which was set forth in the complaint. It alleged that the Petitioner, while driving his automobile on Highway U.S. 20, during the early morning hours of August 19, 1954, (about 1 A.M.) was suddenly confronted on the highway by a loose cow owned by the defendants and that he was forced by this sudden appearance to swerve his car violently and to go off the road and capsize, resulting, in turn, in the complete destruction of the car and the incurrence of an unsightly scar on the nose. The answer of the Respondent amounted to (1) a general denial of the Petitioner's complaint and (2) an alternative defense of contributory negligence (District Couurt Record, page 12).

The case went to trial in the District Court and resulted in a Jury Verdict of Not Guilty in favor of the Respondents. Before the case went to the Jury, the Petitioner requested the Court to instruct the Jury that he was under no duty to anticipate the presence of a cow wandering loose on the highway in the night because Chapter 8, Section I of the Illinois Statutes made such an act unlawful. In support of the Request he cited the Case of *Rost* v. *F. H. Noble & Co.*, 316 Ill. 357, 147 N.E. 258. The Court refused to so instruct the Jury[1]. After the

[1] See Transcript Courts instructions to the Jury, Incorporated in District Court Record.

verdict the Petitioner moved for a new trial on the basis of the court's refusal to instruct the Jury in accordance with the Doctrine of *Rost* v. *F. H. Noble & Co.*, 316 Ill. 457, 147 N.E. 258, in relation to contributory negligence[2]. The Court denied the Motion for a new trial[3] and the Petitioner took an Appeal to the Court of Appeals for the Seventh Circuit on the issue of whether or not the defense of contributory negligence was available in an action brought under Chapter 8, Section I of The Illinois Statutes. The Court denied the Appeal in the opinion set forth in Page 6a of the Appendix. The Petitioner made a Motion for a Rehearing (Appendix Page 13a) and this Motion was denied by the Court on November 17, 1958, (Appendix Page 15a). The Petitioner then filed this Petition in the United States Supreme Court for a Writ of Certitori.

(B) BASIS FOR PETITION.

The Basis for this Petition is that in deciding this case The Court of Appeals failed to follow the decisions of The Illinois Supreme Court in deciding the question at issue and instead followed decisions of the Appellate Courts of Illinois.

The Petitioner maintains that this was in contravention of the decision of the United States Supreme Court in the case of *Erie* v. *Tompkins*, 304 U.S. 64, which case held that in deciding questions of State Law the Federal Courts were bound to apply the decision of the *Highest* State Court that had pronounced on the question.

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[2] District Court Record, Page 24.
[3] District Court Record, Page 27.

(C) IMPORTANCE OF THE CASE.

The Petitioner holds that if he satisfies this Court that the Court of Appeals disregarded the opinions of the Illinois Supreme Court in deciding this case and instead decided it on decisions of the Illinois Appellate Courts, then under the doctrine of *Erie* v. *Tompkins*, 304 U.S. 64, it would be required to overrule the decision of the United States Court of Appeals in order to enforce its own Edict as to the method of deciding cases in the Federal Courts involving state law.

(D) THE ARGUMENT IN CHIEF.

(a) The Statute Under Which the Case was Brought.

As stated above, the Petitioner alleged in his original complaint that he was injured when the presence of a loose cow on the highway in the night caused him to swerve and capsize his car.

Chapter 8, Section I of the Illinois Statutes reads as follows (Illinois Revised Statutes, 1957, Chapter 8, Section I, Page 131) "Prohibits Certain Animals Running at Large:"

"Hereafter, it shall be unlawful for any animal of the species of horse, ass, mule, cattle, sheep, goat, swine or geese to run at large in the State of Illinois; Provided that no owner or keeper of such animals shall be liable in damages in any civil suit for injury to the person or property of another caused by the running at large thereof, without the knowledge of such owner or keeper, when such owner or keeper can establish that he used reasonable care in restraining such animals from so running at large."

(b) The Violation of the First Part of Chapter 8, Section I is a Crime.

The first part of this Statute or the part of it preceding the Proviso clearly and succintly makes it an unlawful act for certain animals to be at large (Illinois Revised Statutes, 1957, Page 131).

Chapter 8, Section 2, provides the penalty for its violation reading in Part:

"Whoever being the owner or having control of any domestic animal of the species mentioned in Section I of this Act, shall suffer the same to run at large shall be fined not less than two dollars nor more than ten dollars for each offense" (Illinois Revised Statutes, 1957, Chapter 8, Section 2, Page 131).

In Illinois a crime consists of "A Violation of a Public Law in the commission of which there shall be a union or joint operation of Act and intention or criminal negligence." *Story* v. *People,* 79 Ill. App. 562. This definition apparently excludes from the category of crimes the violation of many ordinances, especially those relating to traffic violations, where the violator is subject to a penalty even though there was no intent to evade the law. However, in the case of an animal running at large in violation of Chapter 8, Section I of the Illinois Statutes, there can be no doubt that such running at large constitutes a crime within the meaning of the Law in Illinois. In the case of *Bulpit* v. *Matthews,* 145 Ill. 345, 34 N.E. 525 (Appendix Page [illegible]a), the Illinois Supreme Court said:

"Undoubtedly, as suggested, in proceeding under the first Section, it will be necessary to show the stock was at large by the permission or through the fault of the owner. To impose the penalty therein prescribed some

guilty intention to violate the law or willful neglect of the duty imposed must be shown." In other words, criminal intent or willful negligence is necessary to convict under Chapter 8, Section 1, making a violation of the act a crime within the meaning of the law in Illinois.

(E) THE CASE OF ROST vs. NOBLE.

The Petitioner cited to the Court of Appeals, in his brief and in his Motion for a rehearing, the Illinois Supreme Court Case of *Rost* v. *F. H. Noble & Co.*, 316 Ill. 357, 147 N.E. 258 in support of his proposition that the Trial Court should have instructed the Jury that contributory negligence was not available as a defense in an action brought under Chapter 8, Section 1 of The Illinois Statutes. In that case, the Court said:

"The defense (referring to contributory negligence) does not apply to injuries willfully or intentionally inflicted (citing cases). Neither does the defense apply to such causes of action as result from the commission of a crime. A thief sued for the value of the stolen goods cannot allege as a defense the negligence of the owner in the care of them. Every man has a right to assume that no one will commit a crime and his civil rights against an offender do not depend upon the care which he exercised to anticipate and prevent a crime by which he has suffered loss."

Although the Case of *Rost* v. *F. H. Noble & Co.* involved a violation of a Child Labor Law Act, the words of the Court, and the headnotes to the case, indicate that the doctrine that contributory negligence is not a defense to a crime is of general application.

(F) THE COURT OF APPEALS EITHER DISREGARDED OR GAVE CURSORY ATTENTION TO THE CASE OF ROST vs. F. H. NOBLE & COMPANY.

Although not citing the case of *Rost* v. *F. H. Noble & Co.*, in its opinion, the Court of Appeals for the Seventh Circuit stated that the Petitioner had apparently overlooked the fact that he was not engaged in a criminal action. This indicates to the Petitioner that the Court either gave cursory attention to or disregarded the case of *Rost* v. *F. H. Noble & Co.*

The case of *Rost* v. *F. H. Noble & Co.* was not a criminal action but was a civil action for damages based on the violation of a Child Labor Law Statute. Neither is there the slightest indication in *Rost* v. *F. H. Noble & Co.* that the civil action had been preceded by a criminal conviction.

(G) THE CLEAR AND APPARENT MEANING OF ROST vs. F. H. NOBLE & CO.

If there were any doubt as to the meaning of the Illinois Supreme Court in the Case of *Rost* v. *F. H. Noble & Co.*, concerning contributory negligence in relation to crimes, the Petition would defer to the Ruling of the Court of Appeals whether he agreed with it or not. However, he maintains that it is possible to arrive at only one common sense interpretation of what the court was saying in this case.

In the *Rost* v. *Noble* Case the Court was simply saying that where the law of the state makes the doing of a certain act a criminal offense, society is entitled to expect that no one will do that act and is consequently not required to be in readiness for it to occur. The fact that on certain occasions the act might be done by persons who

subsequently prove to have a defense which would render them immune from a criminal conviction, does not place on society the duty of anticipating in advance which persons might or might not be successfully prosecuted in a criminal action, in relation to the commission of any particular criminal offense. If such a duty existed it would mean that although a certain act was made a criminal offense by the law of the state, the individual would still have to be on his guard for the possibility of the act being committed by someone who could not be held criminally responsible for his actions. The meaning of *Rost* v. *F. H. Noble* is simply that society is entitled to assume that *no one* will commit an act made a criminal offense by the law of the State. Such a right does not depend on ultimate criminal responsibility.

Also, it is evident that in *Rost* v. *F. H. Noble*, The Illinois Supreme Court did not mean to require a previous criminal conviction in order to sustain the principle that no one is required to anticipate a criminal act and that consequently contributory negligence is not a defense to a crime. There is no evidence whatsoever in the case, which was a civil action for damages, based on the employment of a minor in violation of the Child Labor Law Act, that the defendant had been criminally prosecuted and found guilty under the penal provisions of the Act. It is certain that had there been any such prior conviction the Plaintiff would have pleaded it. In that case, the Plaintiff simply set up in his complaint that the defendant had violated the terms of the Act by employing a person below the accepted age limit; nothing was said as to intent to violate the law.

The contention of the Respondent, which was upheld by the Court of Appeals, that the principle of *Rost* v. *F. H. Noble & Co.* can only apply where there is proven criminal responsibility is clearly mistaken.

(H) THE CASE OF ROST vs. F. H. NOBLE & CO., THEN IS CONCLUSIVE OF THE ISSUE IN THE INSTANT CASE.

The respondents in the instant case did not assert that a violation of the first part of Chapter 8, Section 1 of the Illinois Statutes is not a crime within the meaning of the law, nor did the United States Court of Appeals for the Seventh Circuit so assert. The wording of the Statute clearly establishes that it is an unlawful act for an unattended animal (of certain species) to be upon the highway or any other place outside its owner's close. The Second Section of the Act establishes a penalty (Illinois Revised Statutes, 1957, Chapter 8, Section 2). The Illinois Supreme Court in *Bulpit* v. *Matthews*, 145 Ill. 345, 34 N.E. 525, ruled that in order to enforce a penalty for a violation of Chapter 8, Section 1, a guilty intent to violate the law or willful negligence amounting to it had to be shown, thus bringing the Act within the definition of a crime under the Illinois Law (*Storey* v. *People*, 79 Ill. App. 562).

The case of *Rost* v. *F. H. Noble & Co.*, 316 Ill. 357, 147 N.E. 258, clearly stated that in Illinois contributory negligence is not a defense to a crime, meaning that it is not a defense to an act for which one may be criminally prosecuted and as the violation of law in the instant case answers that description, the Court of Appeals should have applied the direction of the Court in *Rost* v. *F. H. Noble & Co.* concerning contributory negligence not being a defense to crimes.

(I) THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED THE CASE ON APPELLATE COURT LAW.

The Petitioner has indicated that the Court of Appeals for the Seventh Circuit decided this case on Appellate Court Law after the Petitioner had cited cases of the Illinois Supreme Court in contravention to these Appellate Court cases.

In its opinion (Appendix Page 2a) the Court of Appeals did cite two Illinois Supreme Court cases, *Illinois Central Railroad Co.* v. *Oswald,* 338 Ill. 270; *Dee* v. *The City of Peru,* 343 Ill. 36, 41. These cases only stated the general rule which the Petitioner never denied was in effect in Illinois: That the Plaintiff in a damage suit must be in the exercise of due care or conversely be free of contributory negligence. However, the case of *Rost* v. *Noble & Co.,* 316 Ill. 357, 147 N.E. 258, makes clear that where willful acts or criminal offenses are involved an exception to the general rule exists. So, the Court's citing of *Illinois Central Railroad Co.* v. *Oswald,* 338 Ill. 270, 274; *Dee* v. *The City of Peru,* 343 Ill. 36, 41, is merely argumentative.

After citing these cases the Court of Appeals says in its opinion: "More important is the fact that the *Appellate Courts of Illinois,* in not fewer than five cases, have either held or recognized that contributory negligence is a defense to an action predicated upon the Statute relied upon in the instant case." In support of this statement, the Court cited *Fugett* v. *Murray,* 311 Ill. App. 323; *Gray* v. *Neel,* 340 Ill. App. 111; *Guffey* v. *Gale,* 332 Ill. App. 207, 216; *Farrell* v. *Crawford et al.,* 222 Ill. App. 499, 502; *Donaghue* v. *Fraiken,* 200 Ill. App. 339, 341.

The Petitioner does not find from a reading of these cases that the precise point in issue here was put to the

Court and he believes that in them the Court simply enunciated the general rule in Illinois; that the Plaintiff must allege and show that he was in the exercise of due care at the time of the accident or conversely that he was free of contributory negligence. However, assuming that these cases do decide that contributory negligence is a defense to an action brought under Chapter 8, Section 1 of the Illinois Statute (Illinois Revised Statutes, 1957, Page 131) the Petitioner maintains the result reached in them is contrary to the combined effect of the decisions of the Illinois Supreme Court in *Rost* v. *F. H. Noble & Co.*, 316 Ill. 357, 147 N.E. 258, and *Bulpit* v. *Matthews*, 145 Ill. 345, 34 N.E. 525. The case of *Bulpit* v. *Matthews* shows that a violation of Chapter 8, Section 1 of the Illinois Statute falls within the category of crimes under the Illinois Law in that it is a violation of a State Statute and that the proof of an evil intent or negligence equivalent to it is required to convict under the Penal Supplement to it (Chapter 8, Section 2, Illinois Revised Statutes). The case of *Rost* v. *F. H. Noble & Co.* shows that in Illinois contributory negligence is not a defense to a crime or a violation of criminal law. Under the doctrine of *Erie* v. *Tompkins*, 304 U.S. 65, the Courts of Appeals should have given effect to the decisions of the Illinois Supreme Court rather than to the decisions of the Illinois Appellate Courts.

(J) THE PETITIONER'S ACTION WAS NOT BASED ON NEGLIGENCE, BUT RATHER ON THE CRIMINAL PORTION OF CHAPTER 8, SECTION 1. THE PROVISO TO THIS SECTION WAS ONLY A LEGISLATIVE BOON TO THE FARMING POPULATION OF ILLINOIS IN THE WAY OF AN ABSOLUTE DEFENSE TO CIVIL ACTIONS BROUGHT UNDER CHAPTER 8, SECTION 1. THE DEGREE OF CARE EXERCISED BY A DEFENDANT ON HIS OWN PREMISES TO RESTRAIN HIS ANIMALS IS SOMETHING UTTERLY REMOTE FROM THE PLAINTIFF, COULD NOT BE MADE THE SUBJECT OF ANTICIPATION BY THE PUBLIC AND COULD NOT MAKE THE PRESENT ACTION INTO A COMMON LAW NEGLIGENCE ACTION.

The Respondent also argued, and was supported therein, by the Court of Appeals (see Opinion of the Court of Appeals on Page 6a, Appendix) that the case of *Rost* v. *F. H. Noble & Co.*, 316 Ill. 357, 147 N.E. 258, did not apply here because the instant case was one based on negligence rather than on a criminal offense.

The Petitioner maintains that here again the holding of the Court of Appeals was due to failure to give effect to the decision of the Supreme Court of Illinois in *Bulpit* v. *Matthews*, 145 Ill. 345, 34 N.E. 525, Appendix Page 10a).

In that case the Supreme Court of Illinois held that in a Civil Action based on Chapter 8, Section 1 of the Illinois Statutes, the owner of animals running at large was an insurer as to any damage done by them. The negligence of the owner was not an issue to be considered.

After the *Bulpit* case (1893), the Illinois Legislature, in 1931, enacted a Proviso to Chapter 8, Section 1, reading as follows: "Provided, that no owner or keeper of

such animals shall be liable for damages in any civil suit for injury to the person or property of another caused by the running at large thereof, without the knowledge of such owner or keeper, when such owner or keeper can establish that he used reasonable care in restraining such animals from so running at large." (Illinois Revised Statutes, 1931). The preceding part of the Statute remained as before: "Hereafter, it shall be unlawful for any animal of the species of horse, ass, mule, cattle, sheep, goat, swine or geese to run at large in the State of Illinois."

It is certain that the legislature, by enacting this Proviso without changing the wording of the prior part of the statute did not and could not change a civil suit claiming the benefit of the statute from a statutory action to a common law action for negligence. The Petitioner, had he so elected, could have brought a straight common law action without the benefit of the statute, but then he would not have had the advantage of claiming that the act which occasioned the accident was unlawful in itself without reference to circumstances. The first part of the sta ute reading, "Hereafter, it shall be unlawful for any animal of the species of horse, ass, mule, cattle, sheep, goat, swine or geese to run at large in the State of Illinois," makes the fact of the animals being at large unlawful irrespective of circumstances (*Bulpit* v. *Matthews*, 145 Ill. 345, 34 N.E. 525). So, a civil action brought under Chapter 8, Section 1 of the Illinois Statutes is not based on the negligent violation of a statute, as said by the Court of Appeals, because the act forbidden by the Statute is unlawful in itself, irrespective of negligence or lack of it.

The addition of the Proviso made it necessary to allege negligence by way of saying that the owner had not

exercised reasonable care to restrain his animals, or the equivalent of it, but that does not bring the action into the realm of the ordinary common-law negligence suit. The addition of the 1981 Proviso to Chapter 8, Section 1, of the Illinois Statute, only served to make available to the owner of animals which ran at large and caused damage, a defense, where none had been available before (*Bulpit* v. *Matthews*, 145 Ill. 345). However, the defense made available by the Proviso, that of being able to avoid liability by showing reasonable care had been taken to restrain the animals is an absolute one and one entirely personal to the defendant and utterly remote and unconnected with the fact of the ultimate accident. Lack of care in restraining the animal could not be regarded as the proximate cause of an accident out on the highway in the sense that the term proximate cause is used in connection with common law negligence actions. For instance, how could the fact that a farmer bought an inferior grade of wire to fence his pasture in 1959, be regarded in the ordinary sense as the proximate cause of a highway accident occurring in 1960 or thereafter. As regards the question of contributory negligence, just how, one asks, could the degree of care exercised by the owner of animals on his own property be made the subject of anticipation and hence of contributory negligence on the part of a passing motorist.

The Petitioner maintains this was *not* an action for the negligent violation of a statute, if indeed there is any such thing as the negligent violation of a criminal statute, so as to bring this case within the general rule in Illinois as to contributory negligence being a defense to any action based on negligence, but was rather an action based on a criminal misdemeanor to which con-

tributory negligence is not a defense, under the ruling of the Illinois Supreme Court in *Rost* v. *F. H. Noble & Co.* (316 Ill. 357).

CONCLUSION.

The Petitioner respectfully prays that in the light of the above citations and arguments this Honorable Court grant his Petition for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit in this cause of *Paul F. Beiter* v. *Charles Erb and Louis Frankel.*

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APPENDIX

I.—THE STATUTE IN QUESTION

Chapter 8, Sections 1 and 2, Illinois Statutes

[Illinois Rev. Stat., 1957, Chapter 8, Sections 1 and 2, Page 131]

Domestic Animals Running at Large. An Act in relation to domestic animals running at large within the State of Illinois [Approved June 21, 1895. In force July 1. L. 1895, p. 4.]

1. Prohibits Certain Animals Running at Large.]

§ 1. Hereafter, it shall be unlawful for any animal of the species of horse, ass, mule, cattle, sheep, goat, swine or geese, to run at large in the State of Illinois: Provided that no owner or keeper of such animals shall be liable for damages in any civil suit for injury to the person or property of another cause by the running at large thereof, without the knowledge of such owner or keeper, when such owner or keeper can establish that he used reasonable care in restraining such animals from so running at large [As amended by Act approved May 25, 1931, p. 13].

2. Penalty—Herding Upon Unenclosed Lands.

§ 2. Whoever being the owner or having control of any domestic animal of the species mentioned in Section 1 of this Act shall suffer the same to run at large shall be fined not less than two dollars nor more than ten dollars for each offense, and for every day he shall permit the same to run at large after having once been convicted under this Act. The herding of any such animals upon unenclosed lands without the consent of the owner or person having control of such lands shall be deemed as running at large under the terms of this Act.

II.—JUDGMENT OF THE DISTRICT COURT

United States District Court
Office of the Clerk
United States Court House
Chicago 4

Date: Dec. 12, 1957

Re: Paul F. Beiter
vs.
Charles Erb and Louis Frankel

Case No. 54 C 1714

You are hereby notified that Judge Hoffman entered the following order on Dec. 10, 1957:

The court instructs the jury. Alternates discharged. Marshal sworn. The jury retires to consider its verdict. The jury returns the following verdict. We, the jury find the defendants not guilty. Judgment on the verdict. Jury discharged.

Roy H. Johnson, Clerk

III. The Opinion of the Court of Appeals for the Seventh Circuit.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 12294 — SEPTEMBER TERM AND SESSION, 1958

PAUL F. BEITER,
Plaintiff-Appellant,
v.
CHARLES ERB AND LOUIS FRANKEL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 17, 1958

Before MAJOR, FINNEGAN and HASTINGS, *Circuit Judges.*

MAJOR, *Circuit Judge.* Paul F. Berter, a resident of the State of Wisconsin, instituted this action against Charles Erb and Louis Frankel, residents of the State of Illinois, for the recovery of damages to person and property sustained as a result of their alleged negligence. Jurisdiction rests upon diversity of citizenship, with the requisite jurisdictional amount.

The complaint, so far as here material, alleges:

"That on the 19th day of August, 1954, the Defendants were the owners of cattle which were maintained and kept on a farm owned by the Defendant Louis Frankel, abutting Highway 20 in McHenry County, Illinois.

"That on said day at about 1:00 o'clock in the morning, the Plaintiff, in the exercise of due care for the safety of his own person and property and for that of others, was driving his automobile in a westerly direction on said highway, and the Defendants had allowed a cow to be at large on the highway in violation of the Statute hereinafter set forth. That as the proximate consequence of the negligence of the Defendants in violation of said Statute in allowing said cow to be at large and upon the highway, the said cow and the automobile operated by the Plaintiff collided and Plaintiff was thrown down and injured * * *"

(Then follows a description of the injuries sustained by plaintiff and of the damages to the automobile which he was driving.)

The statute referred to in the complaint is Chapter 8, Sec. I, Ill. Rev. Stats. 1957, and is entitled, "Domestic Animals Running at Large." It provides:

"Hereafter, it shall be unlawful for any animal of the species of horse, ass, mule, cattle, sheep, goat, swine or geese, to run at large in the State of Illinois: Provided, that no owner or keeper of such animals shall be liable for damages in any civil suit for injury to the person or property of another caused by the

> running at large thereof, without the knowledge of such owner or keeper, when such owner or keeper can establish that he used reasonable care in restraining such animals from so running at large."

Defendants' answer contained a general denial of the allegations of the complaint, an allegation of contributory negligence on the part of plaintiff and an affirmative defense of no negligence on their part.

A trial was had by jury which returned a verdict in favor of defendants. From the judgment entered thereon plaintiff appeals.

Plaintiff in his brief under the heading, "Contested Issues," enumerates a number of propositions which are not contested issues but mere statements of fact or principles of law about which there can be little, if any, disagreement. In the argument portion of his brief, however, he has simplified and apparently isolated the sole issue relied upon in this Court. Plaintiff, after referring to the unfavorable jury verdict, states:

> "The Appellant then made a motion for a new trial based on the contention that contributory negligence, short of contributory negligence as a matter of law, is not a defense to an action brought under Chapter 8, Section I of the Illinois Statutes and that the Jury should have been so instructed as requested by the Appellant."

Plaintiff further states:

> "The contention on which this appeal is based then is this: That in a case brought under Chapter 8, Section I of the Illinois Statutes, contributory negligence short of contributory negligence as a matter of law is not a defense which can be availed of.
>
> "During the course of the trial Appellant made admissions from which the Jury could have drawn and Appellant thinks, very probably did, draw a conclusion that his accident was due primarily to contributory negligence on his part."

Thus, plaintiff in effect concedes that the jury might well have found that the accident was the result of con-

tributory negligence on his part. However, in an extended argument he cites and discusses many cases in an attempt to demonstrate that mere contributory negligence is not a defence to an action for negligence based upon a statutory violation. We need not cite or discuss such cases because we are convinced there is no case in Illinois which sustains plaintiff's contention. Plaintiff apparently overlooks the fact that this is not a criminal action or an action to recover a penalty for a statutory violation. It is simply an action for personal injuries and property damage allegedly resulting from defendants' negligence consisting of a statutory violation. It is the universal rule in Illinois, so we think, that in an action for damages to person or property resulting from a defendant's negligence that plaintiff must allege and prove that he was in the exercise of due care and caution for his own safety or, conversely stated, that he was free from contributory negligence. *Illinois Central Railroad Co.* v. *Oswald,* 338 Ill. 270, 274; *Dee* v. *The City of Peru,* 343 Ill. 36, 41.

More important is the fact that the Appellate Courts of Illinois in not fewer than five cases have either held or recognized that contributory negligence is a defense to an action for negligence predicated upon the statute relied upon in the instant case. Such an action was before the Court in *Fugett* v. *Murray,* 311 Ill. App. 323. In response to defendant's contention that plaintiff had failed to prove that she was in the exercise of due care and caution for her own safety, the Court stated (page 333):

> "The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as the question remains whether either party has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as a question of fact to the jury."

In *Guay* v. *Neel,* 340 Ill. App. 111, the Court, in response to a similar contention by the defendant, stated (page 119):

> "There was evidence that plaintiff's husband was driving with due care and with the lights on and that the horses suddenly ran upon the road. The court had a right to find that the impact in which Frosty was killed was not proximately caused by the negligence of the driver of the car."

To the same effect in similar actions see *Guffey* v. *Gale*, 332 Ill. App. 207, 216; *Farrell* v. *Crawford et al.*, 222 Ill. App. 499, 502; *Donaghue* v. *Fraikin*, 200 Ill. App. 339, 341.

Thus, the Illinois cases clearly require a rejection of plaintiff's theory that contributory negligence on his part was no defense in the instant action. Plaintiff, in what is designated as a supplemental brief, contends that the Court erred in its refusal to give certain instructions offered by him. We have considered the argument relative thereto and think it is without merit. Particularly is this so when we take into consideration plaintiff's tacit concession that there was evidence from which the jury might well have found that the accident was proximately caused by his contributory negligence. Moreover, we have read the Court's charge to the jury and are of the view that it was fair and adequate.

The judgment appealed from is

AFFIRMED.

IV. The Opinion of the Supreme Court of Illinois in the Case of Rost v. F. H. Noble & Co., 316 Ill. 357, 147 N.E. 258 at 260 (in part).

(316 Ill. 357)

Rost v. *F. H. Noble & Co.* (No. 16114), Supreme Court of Illinois. Feb. 17, 1925. Rehearing denied with modification April 21, 1925 (in part).

DUNN, J. Andrew Rost, as administrator of the estate of Joseph Zembrzuski, recovered a judgment for $3,000 against F. H. Noble & Co. in an action on the case in the circuit court of Cook county for damages for the death of his intestate, which the Appellate Court affirmed, and the record is brought before us for review by a writ

of certiorari awarded on the petition of the defendant in the trial court.

The declaration in two counts charged that the defendant on March 5, 1920, in Chicago, Ill., was operating a factory, and a freight elevator operated by hand, and other machinery, viz., drilling, punching, and stamping machines driven by electric power; that the deceased, who was a boy between 15 and 16 years old, was employed by defendant in operating a drill machine and in carrying, transferring, loading, and unloading boxes filled with material of great weight and hoisting the same by the elevator; that this work was such extrahazardous employment that it was dangerous to the deceased's life or limb, and he was then and there unlawfully employed at said work, contrary to the statute of the state; that by means of the neglect and default of the defendant, the deceased, while carrying, loading, and unloading boxes to and upon the elevator, was internally injured and ruptured, whereby he got strangulated hernia, from which he died on March 23, 1920.

* * * * *

The statute which is the basis of the action is the Child Labor Act of 1917 (Laws 1917, p. 511).

* * *

[147 N.E. pp. 264-265]:

[13] By instruction 6 the jury were told that the plaintiff was not required to establish his case beyond a reasonable doubt but only by a preponderance of the evidence. The plaintiff in error insists that this was error; that the foundation of the case is the unlawful employment of a child under 16 years of age in violation of the statute, section 13 of which imposes a penalty for its violation of a fine of not less than $5 nor more than $100; that is, the case is founded upon a criminal offense which is charged in the pleadings and must be established by the evidence to maintain the cause of action, and that the measure of evidence required in Illinois, when a criminal offense is charged in the pleadings and must be shown to establish the cause of action or

defense, is such as removes every reasonable doubt of guilt. This rule, which has prevailed from very early in the history of the state, has been consistently adhered to and frequently announced, except in actions of slander or libel, in which it is provided by chapter 126 of the Revised Statutes of 1874 that it shall be competent for the defendant to establish the truth of the matter charged by a preponderance of the testimony. *Crandall* v. *Dawson*, 1 Gilman, 556; *Darling* v. *Banks*, 14 Ill. 46; *McConnel* v. *Delaware Mutual Ins. Co.*, 18 Ill. 228; *Harbison* v. *Shook*, 41 Ill. 141; *Sprague* v. *Dodge*, 48 Ill. 142, 95 Am. Dec. 523; *Germania Fire Ins. Co.* v. *Klewer*, 129 Ill. 599, 22 N. E. 489; *Grimes* v. *Hilliary*, 150 Ill. 141, 36 N. E. 977; *People* v. *Sullivan*, 218 Ill. 419, 75 N. E. 1005; *McInturff* v. *Insurance Co of North America*, 248 Ill 92, 93 N. E. 369, 140 Am. St. Rep. 153, 21 Ann. Cas. 176; *Oliver* v. *Ross*, 289 Ill. 624, 124 N. E. 800. The rule had its origin in England, where there was a reason for its existence arising from the fact that there, "where a defendant justifies words which amount to a charge of felony and proves his justification, the plaintiff may be put on his trial by that verdict, without the intervention of a grand jury." *Cook* v. *Field*, 3 Esp. 133. This reason never existed in this country. The rule is universal that in criminal prosecutions the evidence must satisfy the jury of the truth of the charge beyond a reasonable doubt. In general, where civil rights only are involved, the decision must be upon the preponderance of the evidence. The English rule, where the issue is upon a charge of crime made in the pleadings and necessary to be proved to maintain the action or defense, was followed in some of the states, but has now generally been abandoned. *Ellis* v. *Buzzell*, 60 Me. 209, 11 Am. Rep. 204; *Matthews* v. *Huntley*, 9 N. H. 146; *Gordon* v. *Parmelee*, 15 Gray (Mass) 413; *Washington Ins. Co.* v. *Wilson*, 7 Wis. 169; *Weston* v. *Gravlin*, 49 Vt. 507; *Jones* v. *Greaves*, 26 Ohio St. 2, 20 Am. Rep. 752. The reason in which the rule seems to have had its origin is applicable only to cases where the charge was of a felony, and in general it is in such cases only that the rule has been applied. It will not be extended further but is limited to charges of felony.

The offenses for which penalties are imposed by the statute are not crimes of a character, the charge of which in a civil suit is required to be proved beyond a reasonable doubt, and the instruction properly so advised the jury.

[14-16] The plaintiff in error by its request for instructions sought to have the jury advised that the contributory negligence of the parents of the deceased would bar the plaintiff's action, and that before he could recover the plaintiff must prove, by a preponderance of the evidence, that the employment of the deceased and his injury while employed were not due to the negligence or want of care of the parents. The common law has always given the right to maintain an action for a personal injury caused by the negligent act of another. The negligence of the plaintiff which contributed to the injury was a defense to such action. No action could be maintained at common law for the death of a person caused by the negligent act of another. Such action has been authorized by statute (in this state since 1853) to be prosecuted by the personal representative of the deceased person for the benefit of the surviving wife or husband and next of kin. The negligence of one of the beneficiaries which contributed to the injury is a defense to this statutory action. *Hazel* v. *Hoopeston-Danville Bus Co.*, 310 Ill. 38, 141 N. E. 392, 30 A. L. R. 491; *Ohnesorge* v. *Chicago City Railway Co.*, 259 Ill. 424, 102 N. E. 819; *City of Chicago* v. *Major*, 18 Ill. 349, 68 Am. Dec. 553. These rules have no application to the present action, which is not one for negligence. It is a statutory action for death caused by a wrongful act, of which negligence is not an element. The plaintiff is not obliged to allege or prove negligence of the defendant or freedom from negligence of the plaintiff or the persons for whose benefit the action is brought. The act charged is not negligence but a criminal misdemeanor.

The Child Labor Law was enacted, in the exercise of the police power of the state, for the protection of children whom it renders incapable of entering into the relation of master and servant and relieves from the

contractual effect arising out of that relation. Neither the doctrine of contributory negligence nor of assumed risk applies to an action by a child for an injury received by reason of his employment by the defendant in violation of this law. *American Car Co.* v. *Armentraut*, 214 Ill. 509, 73 N. E. 766; *Strafford* v. *Republic Iron Co.*, 238 Ill. 371, 87 N. E. 358, 20 L. R. A. (N. S.) 876, 128 Am. St. Rep. 129. This action in the name of the administrator of the deceased child is based on the liability of the employer for the wrongful act of employing a child under 16 years of age in violation of the prohibition of the Child Labor Law. The negligence of the parents is no defense to such an action. The defense of contributory negligence is based on the common-law doctrine that there can be no recovery for an injury caused by the common, mutual, concurring negligence of both parties, regardless of the degree in which their negligence, respectively, contributed to the injury. The defense does not apply to injuries willfully or intentionally inflicted. *Walldren Express Co.* v. *Krug*, 291 Ill. 472, 126 N. E. 97; *Heidenreich* v. *Bremner*, 260 Ill. 439, 103 N. E. 275; *Illinois Central Railroad Co.* v. *Leiner*, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266; *Wabash Railroad Co.* v. *Speer*, 156 Ill. 244, 40 N. E. 835; *Lake Shore & Michigan Southern Railway Co.* v. *Bodemer*, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218. Neither does the defense apply to such causes of action as result from the commission of a crime. A thief sued for the value of the stolen goods cannot allege as a defense the negligence of the owner in the care of them. Every man has a right to assume that no one will commit a crime, and his civil rights against an offender do not depend upon the care which he exercised to anticipate and prevent a crime by which he has suffered loss. It was not error to refuse the instructions requested as to the negligence of the parents of the deceased.

* * *

V. The Opinion of the Illinois Supreme Court in the Case of Bulpit v. Matthews, 145 Ill. 345, 34 N.E. 525, 527 (in part).

Bulpit v. *Matthews*, Supreme Court of Illinois, June 19, 1893.

But by the staute now in force, (chapter 8, Rev. St.,) passed in 1874, which is, in effect, sections 1 and 2 of the act of 1872, (rewritten,) a radical change was made. Of the causes producing the rapid development of the state, nothing need be said; but it is a matter of common knowledge that at the time of the passage of the present statute, and long prior to that date, if there was vacant land upon which cattle at large might graze, it was not, as a rule, to be found upon the prairies, but in the poorer and timbered portions of the state, and there in only comparatively small, and constantly decreasing, quantities. The conditions and circumstances of the country and people had radically changed since the decision of the *Seely* v. *Peters* case, and the reasons for rejecting the rule of the common law, so far as its exclusion was based upon the physical condition of the state, and the needs and habits of the people, had ceased to exist. It cannot be doubted that it was in view of these changed conditions, and, it may be presumed, in view of the holding in *Headen* v. *Rust*, that the legislation of 1874 upon the subject was enacted. Section 1 of the act of 1874 imposes a penalty upon any person suffering or permitting domestic animals to run at large within the state, except when authorized as in that act provided. Section 2 provides for submitting the question of permitting animals to run at large to a vote of the electors of the county. Section 3 relates to the form of the ballot, manner of voting, and canvassing and return of the votes. Section 4 provides: If a majority of all votes cast in the county at such election shall be for domestic animals, or any species thereof, running at large, it shall be lawful in such county, for domestic animals, or such species thereof, to run at large; provided, that if at any such election the vote in any precinct in counties not under township organization, or in any town in counties under township organization, or in any incorporated city, village, or town in any county, shall be against domestic animals, or any species thereof, running at large, it shall not be lawful for such animals to run at large in such precinct or town, or incorporated city, village, or town." Section 5 provides that, in any county

wherein animals are allowed to run at large pursuant to a vote theretofore had, on petition, etc., being filed with the county clerk, a vote may be taken in any incorporated city or village, precinct or town, under the act, and, if a majority of the votes cast shall be against animals running at large, then it shall not be lawful for them to run at large in such city, village, precinct, or town. Section 6 provides that the act shall not be construed so as to prohibit the running at large of domestic animals in any county, precinct, or town, incorporated city or village, "where the same is allowed pursuant to any election held by virtue of any law in force at the time this act shall take effect." *Vogt* v. *Dunley*, 97 Ill. 424.

Construing these provisions together, it is manifest, we think, that the legislature intended that only as the result of an election at which the question had been submitted under the provisions of this, or some prior statute authorizing it, can domestic animals lawfully be at large within this state. Prior to the passage of this law, as we have seen, the territory in which they were prohibited from running at large was an exception out of the general rule. By this statute that rule was abrogated, and the general rule of law established that animals could not lawfully be at large within the state except within such political subdivisions as the people, by an affirmative vote, had formally expressed their desire that such animals should be permitted to run at large. *All other running at large of stock upon the highways or commons, or upon the land of others than the owner, without license, is made unlawful.* Undoubtedly, as suggested, in proceeding under the first section of the act, it will be necessary to show that the stock was at large by the permission or through the fault of the owner. To impose the penalty therein prescribed, some guilty intention to violate the law, or willful neglect of the duty imposed, must be shown. *Case* v. *Hall*, 21 Ill. 632; *Kinder* v. *Gillespie*, 63 Ill. 88. But this does not affect the question being considered. The stock at large, with

or without the knowledge or consent of the owner, is unlawfully and wrongfully at large, unless, by an affirmative vote, the county, city or village, precinct or town, has been excepted out of the general rule and policy of the state. * * * (Emphasis Supplied)

Petitioner's Comment

In 1895 the Illinois Legislature removed the power of localities to determine whether or not the animals classified under Chapter 8, Section I could run at large within their boundaries and since that time Chapter 8, Section 1 has been in force throughout the state. See Illinois Laws 1895, Page 4.

VI. The Petitioner's Motion for a Rehearing by the Court of Appeals.

(a)

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

PAUL F. BEITER, *Plaintiff-Appellant,* vs. CHARLES ERB and LOUIS FRANKEL, *Defendants-Appellees.*	No. 12294 Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

PETITION BY APPELLANT PAUL F. BEITER FOR A RE-HEARING IN THE ABOVE DESIGNATED CAUSE

And now comes the Appellant Paul F. Beiter and petitions and says as follows:

1. That on October 17, 1958, this Honorable Court denied his appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

2. That for the reasons set forth in a document entitled "Statement of Reasons for the Granting of a Re-hearing," Paul F. Beiter respectfully petitions this Court to grant him a re-hearing in the above designated Cause.

/s/ Paul F. Beiter
By /s/ Cleland P. Fisher
/s/ Thomas U. Flanner
His Attorneys

(b)

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

PAUL F. BEITER,
Plaintiff-Appellant,
vs.
CHARLES ERB and LOUIS FRANKEL,
Defendants-Appellees.
No. 12294

(In Part)

STATEMENT OF REASONS FOR RE-HEARING

Par. 4. "Assuming the cases of *Fugett* v. *Murray,* 311 Ill. App. 323, *Guay* v. *Neel,* 340 Ill. App. 111, *Guffey* v. *Gale,* 332 Ill. App. 207, *Farrell* v. *Crawford,* 222 Ill. App. 499, *Donaghue* v. *Fraikin,* 200 Ill. App. 339, to decide the instant case in favor of the appellees, appellants insist that under the rule of *Erie* v. *Tompkins,* 304 U.S. 64, the Court is bound to give effect to the decision of the Illinois Supreme Court in the case of *Rost* v. *F. H. Noble & Co.,* 315 Ill. 357, 147 N.E. 258, which declared that in Illinois "Contributory negligence is not a defense to a crime."

Petitioner's Comment

The case of *Bulpit* v. *Matthews,* 145 Ill. 345, 34 N.E. 525, is not cited in the Motion for a Rehearing, but was cited to the Court of Appeals in the Petitioner's brief along with the *Rost* v. *F. H. Noble & Co.* case. It is com-

prehended within the Court's statement in its opinion (See this appendix, Page 6a) reading, "However, in an extended argument he cites and discusses many cases in an attempt to demonstrate that mere contributory negligence is not a defense to an action for negligence based upon a statutory violation. We need not cite or discuss such cases because we are convinced there is no case in Illinois which sustains Plaintiff's contention."

VII. The Denial by the United States Court of Appeals of the Petitioner's Petition for a Rehearing.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Monday, November 17, 1958

Before

Hon. J. Earl Major, Circuit Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. John S. Hastings, Circuit Judge

Paul F. Beiter, *Plaintiff-Appellant* vs. No. 12294 Charles Erb and Louis Frankel, *Defendants-Appellees*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this Cause be, and the same is hereby,

Denied.